IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	CASE NO.: 5:15-CR-446
	)	
Plaintiff,	)	JUDGE DAN AARON POLSTER
	)	
v.	)	
	)	
TERRENCE JOSEPH MCNEIL,	)	GOVERNMENT'S REPLY TO
	)	DEFENDANT'S RESPONSE TO
Defendant.	)	GOVERNMENT'S MOTION IN LIMINE

Now comes the United States of America, by and through its attorneys, David A. Sierleja, Acting United States Attorney, and Assistant United States Attorneys Christos N. Georgalis and Michelle M. Baeppler, and respectfully files this reply to Defendant's Response to Government's Motion in Limine (Doc. 70). (R. 82: Response, PageID 755).

A. This Court should Preclude Defendant From Presenting Evidence and Argument That Is Inadmissible and Irrelevant.

1. Defendant's Own Out-of-Court Statements Are Inadmissible Hearsay.

Defendant acknowledges the hearsay rules as defined in Fed. R. Evid. 802 and 802(c) and in doing so reserves his right to address this issue should he testify at trial. However, it is the Court's prerogative to make preliminary determinations regarding the application of the rules of evidence as set forth in Rule 104. Rule 104(a) provides: "The court must decide any preliminary question about whether . . . evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege." Defendant's testimony at trial, if any, should have no impact on the government's request in limine.

As stated in the government's Motion in Limine, we anticipate Defendant may attempt to introduce evidence of his own statements in the form of social media postings or otherwise to prove the truth of the matters asserted in them. (R. 70: Motion, PageID 699, 500). A party cannot establish a defense by introducing his own statement through a third-party witness. If a defendant wants his or her version of the events before the court, the defendant must take the witness stand, under oath, and be subject to cross-examination. United States v. Nakai, 413 F.3d 1019, 1022 (9th Cir. 2005) (rejecting the defendant's attempt to introduce his own exculpatory statement). For all of these reasons, the government respectfully requests the Court's resolution of this matter.

2. Evidence of Third Party Guilt Is Inadmissible At Trial.

The government requests the Court to preclude Defendant from introducing evidence of third party guilt. (R. 70: Motion, PageID 599, 601). Defendant argues the government's request to preclude Defendant from introducing evidence of third party guilt is an "overbroad request" and is "is limiting [defendant's] ability to present his case." (R. 82: Response at PageID 756).

"[The] defendant's right to present evidence is not unlimited, but rather it is subject to reasonable restrictions." United States v. Scheffer , 523 U.S. 303, 308 (1998). "The Supreme Court has made it perfectly clear that [the defendant's] right to present a 'complete' defense is not an unlimited right to ride roughshod over reasonable evidentiary restrictions." Couturier v. Vasbinder, 385 Fed. Appx. 509, 516 (6th Cir. 2010) (quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973). Defendant "does not have an unfettered right to offer evidence that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." Montana

v. Egelhoff, 518 U.S. 37, 42 (1996) (quoting Taylor v. Illinois, 484 U.S. 400, 410 (1988)). Criminal defendants "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." Wynne v. Renico, 606 F.3d 867, 870 (6th Cir. 2010) (quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973)). The application of such rules does not abridge an accused's right to present a defense so long as they are not "arbitrary or disproportionate to the purposes they are designed to serve." Renico, 606 F.3d at 870 (quoting Scheffer, 423 U.S. at 308).

"Generally, evidence of third party culpability is not admissible unless there is substantial evidence directly connecting that person with the offense." Andrews v. Stegall, 11 F. App'x 394, 396 (6th Cir. 2001) (quoting Walters v. McCormick, 122 F.3d 1172, 1177 (9th Cir. 1997)). Of course, the facts of the origination of these posts and reposts is admissible at trial. But what the government's Motion in Limine seeks to exclude is any testimony or argument regarding whether the government has charged any other individual regarding these posts and reposts. It is that testimony and argument which is inadmissible. For all of these reasons, the government respectfully requests the Court's resolution of this matter.

3. Defendant's Anticipated Arguments On The Reposting of His Solicitations, Threats, and Intimidations Should Be Prohibited As A Misstatement Of The Law.

The government's Motion in Limine seeks to prohibit Defendant from arguing at trial that he cannot be found guilty of these violations because they were re-postings. Of course, intent is an issue at trial. But what the Motion in Limine seeks to preclude is argument that as a matter of law, he cannot be found guilty of these crimes simply because he did not originate these kill lists. For all of these reasons, the government respectfully requests the Court's resolution of this matter.

B. This Court Should Prohibit Defendant From Presenting Evidence and Argument Concerning Lawfulness and Non-Illegal Conduct.

Defendant argues he should be permitted to present evidence of his lawfulness and non-illegal conduct "which occurred at the time of the re-posting for which he is under indictment." (R. 82: Response, at PageID 757). Indeed, "[e]vidence that a defendant acted lawfully on other occasions is generally inadmissible to prove he acted lawfully on the occasion alleged in the indictment." United States v. Reese, 666 F.3d 1007, 1020 (7th Cir. 2012) (citing United States v. Heidecke, 900 F.2d 1155, 1162 (7th Cir. 1990). As anticipated, and as evidenced by Defendant's filed Exhibit List, Defendant intends to put into evidence a number of exhibits that are irrelevant to the crimes charged in this case. For instance, Defendant's Exhibit List contains such exhibits described as: "Farm Scenery, Bowl of Strawberries, Hand Holding Strawberry, Cows in Pasture, Summer Sky" and the like. That Defendant may have taken photographs of these items has absolutely no bearing on the crimes charged in this case. They are irrelevant and will present as "good acts" evidence, which as described in the government's Motion in Limine, is inadmissible at trial. If admitted, any probative value of this evidence is substantially outweighed by the likelihood of jury confusion. The Court, therefore, should not permit Defendant to offer specific instances of irrelevant lawfulness.

C. This Court should Preclude Defendant From Informing the Jury of the Consequences of its Verdict.

As an initial matter, the government does not anticipate presenting exhibit 117, as referenced by Defendant in his response (R. 82: Response, at PageID 758), at trial. Indeed, nowhere on the government's Exhibit List does this specific exhibit appear (noting, however, that the Trial Exhibit List numbering is different from the Exhibit List numbering for purposes of the recently held evidentiary hearing). In addition, the Supreme Court has stated that, unless juries have roles in sentencing, such as in capital sentencing proceedings, juries should be instructed not to consider defendants' possible sentences during deliberations. "It is well established that when a jury has no sentencing function, it should be admonished to 'reach its verdict without regard to what sentence might be imposed.'" Shannon v. United States, 512 U.S. 573, 579 (1994) (quoting Rogers v. United States, 422 U.S. 35, 40 (1975)). Jurors generally are not informed of mandatory minimum or maximum sentences or instructed on probation, parole, and sentencing ranged for lesser included offenses. Id. at 471. For all of these reasons, the government respectfully requests the Court's resolution of this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April 2017 a copy of the foregoing document was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's system.

/s/ Chris N. Georgalis
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